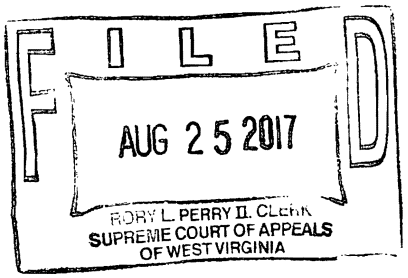

SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS MICHAEL COYNE AND TRIPLE S&D, INC.

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PETITIONERS' REPLY TO BRIEF OF RESPONDENTS MICHAEL COYNE AND TRIPLE S&D, INC.

I. STATEMENT OF THE CASE

b. COUNTERSTATEMENT OF FACTS

Respondents Coyne and Triple S&D, Inc. (hereinafter "Coyne Respondents")in their Brief at page 3 allege without citing to the record that, "Petitioners watered the foundation, which caused water damage to the walls."

That is an erroneous assessment of the evidence. No expert witness has testified that Petitioners caused any water damage. Not one picture out of several hundreds is cited for water damage done by Petitioners. The unrefuted evidence is stated previously on page 20 of Petitioners' Brief:

> On cross-examination by Petitioners counsel Petitioner Terri Smith explained that there was **just a temporary change in color, from wet to dry, no permanent damage** and "**Just the same marks that's always there.** Appendix Vol. 2, pg 2333-2334, Transcript 11/14/16 pg 56, line 22 - pg 57, line 5.
>
> Petitioner Kenneth Smith testified on direct exam by Mr. Craycraft for Respondent Gebhardt at the evidentiary hearing that "**We didn't damage anything.**" Appendix Vol 2, pg 2379, Transcript 11/14/16 pg 102, line 19. On cross-examination by Petitioners counsel Petitioner Kenneth Smith explained that the **water stains had been there for at least 3 years and that the testing by Terri Smith did not change them.**
> Appendix Vol. 2, pg 2384, Transcript 11/14/16 pg 107, lines 8 - 15. (Emphasis added)

Coyne Respondents in their Brief at page 3 allege without citing to the record that, "Petitioners placed a screen over the away drain, slowing the water exiting the foundation and likely causing water intrusion."

That is an erroneous assessment of the evidence. No witness did a flow analysis. No expert witness has testified that the screen resulted in "slowing the water" and the representation of the screen "likely causing water intrusion" is pure speculation.

Respondent Gebhardt's expert, Eric Drozdowski, P.E., took pictures of the "screen" over the end of the pipe and one of his pictures actually shows water flowing from the pipe through the screen. Appendix Vol. 4, pg 4812.

Coyne Respondents in their Brief at page 4 allege citing to the record at "Appx. Vol. 3, p.3523-3524" that, "Josh Emery, allegedly Petitioners' waterproofing expert, explained in his deposition he quoted Petitioners a price of $16,956.00, which he guaranteed." (Emphasis added).

That is an erroneous assessment of the evidence. The guarantee/warranty Mr. Emery gave through his employer, Baker's Waterproofing, only applied to water entering the home between the joint between the floor and the wall. The warranty did not cover water flowing down the wall, which Petitioners needed warranted or guaranteed. Mr. Emery testified:

Q. Okay. So it appears to me that **the warranty is for the interior drain system is if the water comes out at the joint between the floor and the wall.** Would that be fair to say?

A. That's what it reads.

Q. But **if the water came down the wall, that's not part of your warranty, is it, or Baker's?**

A. **That's not a part of Baker's warranty**. Appendix Vol. 3, pg. 3559, lines 10-17. (Emphasis added).

Coyne Respondents in their Brief at page 5 allege citing to the record at "Appx. Vol. 2, p.1925" that, "The subpoena also confusingly directed Gebhardt to deliver those receipts in both Ohio and Marshall County."

That is an erroneous assessment of the evidence. The subpoena states in small 9 point type:

> YOU ARE HEREBY COMMANDED to appear in the Circuit Court of Marshall County at the Place, date and time specified below to testify in the trial of the above-styled case,

Appendix Vol. 2, pg.1925.

It is conceded that the subpoena is somewhat confusing as the subpoena refers to "Marshall County" but the "above-styled case" is the correct Ohio County case caption. Appendix Vol. 2, pg.1925. However, the ONLY address or "Place" on the subpoena is in boldfaced larger type:

OHIO COUNTY COURTHOUSE
JUDGE SIMS' COURTROOM
5TH FLOOR
1500 CHAPLINE STREET
WHEELING WV 26003

Appendix Vol. 2, pg.1925.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners, Terri Smith and Kenneth Smith, by counsel, believe that the decisional process would be significantly aided by oral argument. Petitioners' counsel requests oral argument pursuant to Rule 19(a)(1) as this case involves assignments of error in the application of settled law, pursuant to Rule 19(a)(2) as there was an unsustainable exercise of discretion where the law governing discretion is settled and pursuant to Rule 19(a)(3) as there was insufficient evidence for dismissal or dismissal was against the weight of the evidence.

III. STANDARDS OF REVIEW

(R)eview in this case is the imposition of sanctions by the lower court, to which we apply an abuse of discretion standard. *See* Bartles v. Hinkle, 196 W.Va. 381, 389, 472 S.E.2d 827,835 (1996) (" 'A primary aspect of ... [a trial court's] discretion is the ability to fashion an *appropriate* sanction for conduct that abuses the judicial process.' Chambers v. NASCO,Inc., 501 U.S. 32, 44-45, 111 S.Ct. 2123, 2132-2133, 115 LED.2d 27,45(1991)." (Bracketed language and emphasis in original.)).

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 146 (2010) .

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.
Syl. Pt 2, Bartles v. Hinkle, 196 W.Va. 381, 389, 472 S.E.2d 827 (1996).

Syl. Pt. 6, State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139(2010).

Under the provisions of syllabus point two of *Bartles*, our review actually involves a two-step process of first examining whether the sanctioning court identified the wrongful conduct with clear explanation on the record of why it decided that a sanction was appropriate. 196 W.Va. at 384, 472 S.E.2d at 830. We then must determine whether the sanction actually imposed fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, **any mitigating circumstances**, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing.

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 149 (2010)(Emphasis added).

Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party."

Syl. Pt. 7, State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139(2010).

As was stated in Cattrell Cos. V. Carlton , Inc., 217 W.Va. 1, 14, 614 S.E.2d 1, 14 (2005), "dismissal and default [judgment] are [considered] drastic sanctions that should be imposed only in extreme circumstances." *See also,* Doulamis v. Alpine Lake Prop.

> *Owners Ass'n, Inc.*, 184 W.Va. 107, 112, 399 S.E.2d 689, 694 (1990) (stating that "**dismissal, the harshest sanction, should be used sparingly and only after other sanctions have failed to bring about compliance**."); *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. at 172, 332 S.E.2d at 134 (1985) (advising that the sanction of default judgment "should be used sparingly and only in extreme situations [in order to effectuate] the policy of the law favoring the disposition of cases on their merits.").

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 149 (2010)(Emphasis added).

IV. ARGUMENT

a. The Trial Court abused its discretion in dismissing the case as a sanction for litigation misconduct and spoilation of evidence.

i. Courts have the inherent power to control their own docket independent of any specific statute or rule.

Petitioners agree. However, that inherent power must be kept in check under an abuse of discretion standard.

ii. Discovery based sanctions under W.Va. R.Civ. P. 37 and the Trial Court's inherent power to issue sanctions share abuse of discretion standards, including "a court *shall* be guided by equitable principles" and "any mitigating circumstances." See Syl. Pt 2, *in part, Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827 (1996); and Syl. Pt. 6, *in part, State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139(2010) (Emphasis added).

Respondents state in their Brief at page 11 as follows: "First, Petitioners *were* warned, repeatedly, about spoliation issues."

Actually, the Trial Court made one warning during the Pre-Trial Conference on October 16, 2015 about the air samples for mold testing done by John Gongola. Appendix Vol. 2, pgs 2173-2174. After that warning no issues occurred about spoliation of evidence as they all occurred before the October 16, 2015 Pre-Trial Conference.

The orange painted lines were done by Jake Lammott on August 13, 2014, (Appendix Vol. 3, pgs 3691-3692); the mold air sampling by John Gongola on September 25, 2014(Appendix Vol.

6, pgs 6279-6535); removal of 18 ½ bricks by Frank Baker in November 2014 (Appendix Vol. 6, pgs6562-6569 &6586-6591); the bannister Newel post disassembly by Petitioner Kenneth Smith on March 18, 2015(Appendix Vol. 6, pgs 6688-6695), and the removal of the away drain screen by Petitioner Kenneth Smith on March 18, 2015(Appendix Vol. 6, pgs 6698-6699) all occurred months before the October 16, 2015 Pre-Trial Conference warning.

The Trial Court initially ordered a year later on October 16, 2016, that the mold air samples and testing were admissible and denied sanctions. Appendix Vol. 1, pg 128.

There are no allegations that any spoilation of evidence occurred after the October 16, 2015, Pre-Trial Conference warning. The next time the Trial Court mentioned "notice" relating to spoliation was over a year later at the second Pre-Trial Conference on November 4, 2016, in response to Petitioners' counsel bringing up the prior November 2014 brick removal, suggesting that it should be "good evidence" that the Trial Court should notice on a contemplated pre-trial judicial view of the home. Appendix Vol. 2, pgs 2269-2270.

There was no discussion about notice being required for service of trial subpoenas.

Petitioners counsel had Respondent Gebhardt served with a trial subpoena and rather than Respondent Gebhardt's counsel filing a Motion to Quash, a 6 page Motion to Dismiss alleging witness tampering was filed. Appendix Vol. 2. 1864-1870.

The Trial Court postponed the trial due to the serious allegations and scheduled an evidentiary hearing on the Motion to Dismiss. However the issues at the hearing went well beyond the witness tampering issue and the Trial Court's Order dismissing the case resurrected the spoliation issues that were over a year old and had already been ruled upon, without prior sanctions. Had there been notice that all issues were to be reconsidered the hearing could have taken 2 or 3 days.

Petitioners had their liability experts, Alan Baker, John Gongola and Martin Maness present, dismissing Mr. Baker initially, then dismissing Mr. Gongola and Mr. Maness after Respondent Gebhardts's counsel stipulated that there remained 177 feet of the veneer brick wall that had not been touched. Appendix Vol. 2, pgs 2417-2420.

Petitioners' counsel made representations of fact to the Trial Court to vouch the record and the Trial Court stated, "I'll accept your version of those events as true." Appendix Vol. 2, pg 2420, lines 14-15.

The Trial Court's Order dismissing the case came as a complete surprise, especially when there was no proof of or finding of witness tampering.

b. The Trial Court erred dismissing the case against all Respondents for repeated wilful litigation misconduct.

The Coyne Respondents cite the Trial Court's Order dismissing the case which finds:

> However, taken as a whole, Plaintiffs' actions demonstrate a pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice and deprives Defendants of their right to a fair trial in this matter.

Appendix Vol. 1, pg. 19. See Respondent Coyne's Brief at page 16.

However, the Trial Court made erroneous assessments of the evidence and erroneous assessments of the law as support of those findings.

The Coyne Respondents refer to *Gratton v. Great American Communications*, 178 F.3d 1373(11th Cir. 1999) where there were four to six secretly recorded tapes, only two of which were produced. Initially the lower Court prohibited Gratton from making any reference to the tapes as he only provided two of them. Thereafter Gratton refused to follow an Order requiring him to sign medical authorizations and failed to attend a hearing. Thereafter the Court dismissed Gratton's case as a sanction for the combined actions.

In the case at bar, the Petitioners voluntarily produced the one and only tape recording. Additionally, after the Trial Court advised Petitioners' counsel that notice should be given regarding anything to do with physical evidence during the October 16, 2014, Pretrial Conference, no actions were taken regarding any physical evidence.

i. Petitioners allege spoliation of evidence was not grounds for dismissal.

The Coyne Respondents argue that, "Both Respondents pointed out they could no longer inspect the property." See Coyne Respondents' Brief at page 18.

That is a mischaracterization of the evidence as the water stained basement block walls, the exterior brick veneer wall, the bannister to the basement and the air inside the house that contains mold have all been inspected by all parties' experts and all parties have been given permission to do additional inspection and testing. See Appendix Vol. 1, pg. 574; Vol. 2, 1523.

A. The "orange paint" test.

The pictures of the orange painted lines taken by the Coyne Respondents' expert, Lorey Caldwell, P.E., on March 16, 2016, prove that the cement block walls were not destroyed and the water staining on them was not destroyed. Although there are orange lines painted through the water staining, none of the water staining has been destroyed and may be readily seen. Mr. Caldwell's pictures prove that unequivocally. See pictures at Appendix Vol. 5, pgs 5452-5474.

Please remember that the Coyne Respondents were the masons who constructed the exterior brick veneer wall which Petitioners' and all Respondents' experts agree was not built to the applicable building codes. Petitioners and their experts contend the brick veneer wall is a significant source of the water intrusion in the home. The condition of the orange painted walls was not mentioned in Mr. Caldwell's March 25, 2015, report. Appendix Vol. 2, pgs 1454-1465. In fact, Mr.

Caldwell was not inhibited in giving his ultimate opinion that the Coyne Respondents were not at fault regarding any of the basement water problems. His report states:

> Paragraph 7. The chronic water problems with the basement may be caused by multiple issues related to multiple other parties involved in the construction of the Smith residence. However, **none of the basement water problems are related to the work of Mason.**

Appendix Vol. 2, pg 1465. Page 11 of Caldwell Report (Emphasis added).

B. Intentional watering of the foundation.

Petitioners admitted in their Complaint that they did water hose tests on the brick veneer to see whether it would cause the interior basement walls to become wet before they filed a lawsuit. The Coyne Respondents argue that this was "pre-suit spoliation of evidence. . ." See Coyne Respondents' Brief at page 21.

The Coyne Respondents also argue that they are inextricably tied to Respondent Gebhardt.

> Respondent Coyne was a sub-contractor for Gebhardt and therefore inextricably tied to all legal theories in evidence involving Gebhardt.

See Coyne Respondents' Brief at page 28.

Respondent Gebhardt also admitted doing pre-suit water hose tests on the brick veneer with Petitioner Kenneth Smith to assist Mr. Gebhardt by alerting him when water began to infiltrate into the basement. Appendix Vol. 3, pg. 3201, Gebhardt Deposition, pg. 152, line 11-19. Accordingly, the Coyne Respondents have done pre-suit water hose testing as they are "inextricably tied" to Respondent Gebhardt. Petitioners should not be punished for doing the same thing as Respondents.

As noted previously herein, the Petitioners' water hose test temporarily made the interior cement block walls wet, however, it did not materially change them. The Petitioners water hose tests were done in three days whereas there were three years of water stains made by natural outside water,

rain and melting snow that infiltrated into the basement.

Coyne Respondents' expert, Lorey Caldwell, explained that the water hose tests were not destructive tests at all and that the actual destructive water tests provided by ASTM E2128 were not done. Mr. Caldwell testified:

> Q. So that I can write it down, may I impose on you to tell me what that standard is again, please?
>
> A. ASTM E2128.
>
> Q. Do you remember any part of that protocol that would relate specifically to brick veneer walls?
>
> A. There is a section that is specifically related to brick.
>
> Q. You didn't do that ASTM E2128 protocol during your inspection of the Smiths' home, did you?
>
> A. No.
>
> Q. Why not?
>
> A. Because it was a preliminary inspection for a preliminary report, didn't have all the data at that particular time, was still gathering data. It's not a test that you can do on your own. You have to have obviously the permission of the owner. **It's a destructive test and it's very expensive. It's not just squirting water from a hose on a wall.**
>
> Q. Well what's destructive about it?
>
> A. Well, you have to cut a hole from the outside. You have to see where the water is going. It would require cutting Gypsum wallboard on the inside, removing insulation, cutting the backside of the OSB wall sheathing out so you could actually see the back of the brick from the house. It is very destructive.

Appendix Vol. 2, pg 2584-2585, Caldwell Deposition, pg 77, line 6 to pg 78, line 6. (Emphasis added.)

There is absolutely no evidence in the case or cited in the record by any of the Respondents that the water hose tests caused any damage whatsoever to Petitioners home. The only evidence is

from Petitioners that the water hose tests temporarily caused the basement walls to become wet which dried and did not cause any further staining to the stains that had been there for 3 years. This evidence is unrefuted.

Coyne Respondents' argue on page 20 of their brief without any reference to the record that:

> Petitioners both admitted at the evidentiary hearing they watered the corners of the house and caused water to enter the house. **It is undisputed that this was done during litigation.** (Emphasis added).

This is yet another misstatement of the evidence and record. It should be noted that Petitioners water hose tests were timed and as soon as the interior basement cement block walls started to show wetness, the tests were stopped, dates (April 14, 15 & 23, 2013) and length of each test recorded to be alleged specifically in the Complaint at paragraphs 50, 51 and 58 which was filed 6 months later on September 27, 2013. Appendix Vol. 2, pgs. 138, 140.

Further, Coyne Respondents' expert, Lorey Caldwell, testified that the destructive ASTM E2128 water test was not done, which was different than "just squirting water from a hose on a wall." Appendix Vol. 2, pg2584, Caldwell Deposition, pg 78, lines 22-23. Accordingly, Mr. Caldwell's testimony suggesting that the wall hose water test is not a destructive type test is also unrefuted evidence that there was no spoliation of evidence.

C. Removal of the brick exterior.

The Coyne Respondents argue on page 22-23 of their Response Brief, noting they previously argued in their Motion in Limine regarding Spoliation of Evidence, as follows:

> No one did any testing of the underlayment or the wood amaterial to determine whether or not degradation because of water had occurred. In other words, **a wonderful opportunity to essentially exculpate this Defendant from all liability has gone.** (Emphais added).

The Coyne Respondents appear to have forgotten that their expert, Lorey Caldwell, P.E., actually utilized the area where the brick had been removed to prove that the area was dry. Mr.

Caldwell's report expressly states:

> At the **masonry inspection opening** at the northwest corner of the house, the house wrap showed **no evidence of water staining or moisture in the cavity**, clearly indicating that the cavity area was dry.
>
> From the interior side, the exterior framed walls were checked for moisture to determine if moisture was present in the wall cavities. All readings were 0.0, indicating the wall cavities were dry, with no moisture detected.

Appendix Vol. 5, pg. 5277, Caldwell Report, pg. 8. (Emphasis added).

Mr. Caldwell's pictures of the brick removal area also indicate no water staining and dryness. Appendix Vol. 5, pgs.5480-5491. Mr. Caldwell's report referred to the area where the brick veneer was removed as the "masonry inspection opening." Appendix Vol. 5, pg. 5277. Nowhere in his report or deposition did he indicate that brick removal evidence was the subject of spoliation.

In fact, Mr. Caldwell used the "masonry inspection opening" to prove that the area was dry and therefore the Defendants realized their "wonderful opportunity to essentially exculpate this Defendant from all liability." See Coyne Respondents' Brief at page 22-23.

However, whether the brick veneer actually permits water intrusion is contested by Petitioners, Petitioners' experts, Respondent Gebhardt's water hose tests and Respondent Gebhardt's actions in sealing the brick 3 times in 3 years when the sealing material stopped repelling water from the bricks as shown by his water hose tests.

D. Blocking the away drain.

The Coyne Respondents argue on page 23-24 of their Response Brief:

> **As noted by the Court, Petitioners' own expert, Alan Baker, explained that it was 'unreasonable" for Plaintiffs to block their foundation drain pipe, and that blocking the pipe would "suggest that Plaintiffs intended to get water in their basement.**" Appx. Vol. 1, p.10, ¶2, *see also* Appx. Vol. 2, p. 4294,14:7 - 14:17. (Emphasis added).

That representation to this Supreme Court of Appeals is intentionally taken out of context,

is false and misleading. Mr Baker actually testified that it would be unreasonable for "a homeowner" to block a drainage pipe, not specifically the Petitioners. He testified that he had no knowledge of the Smith Petitioners ever blocked a drainage pipe.

Q. Okay. What if **a homeowner** blocked it intentionally, blocked a drainage pipe intentionally?

A. I would say so.

Q. Why would that be unreasonable to block a drainage pipe?

A. I guess they were trying to get some water in the basement maybe.

Q. Blocking a drainage pipe could lead to water in a homeowner's basement; right?

A. It could.

Q. All right. So it's a bad idea?

A. I think so.

Q. All right. **Are you aware whether the drainage system has been blocked at the Smith home?**

A. **Not that I know of.**

Q. Have you ever been to the Smith home?

A. Yes.

Appendix Vol. 2, pg. 4294, Baker deposition pg 14, lines 7- 24. (Emphasis added).

It is misrepresentations of the evidence like this that lead courts to make erroneous assessments of the evidence. The Coyne Respondents cite "Appx. Vol. 2, p. 4294,14:7 - 14:17" in support if the misrepresentation, but the next omitted 7 lines of Mr. Baker's testimony shows he had no knowledge of any blockage of any drain by the Smiths, your Petitioners. Appendix Vol. 2, pg. 4294, Baker deposition pg 14, lines 18- 24.

Regarding water on the basement floor, Mr. Caldwell's inspection report states:

> All of the sawn controlled joints in the floor slab were filled with water, and standing water was observed in several locations on the basement floor slab.

Appendix Vol. 5, pg. 5270, Caldwell report, page 2.

The Coyne Respondents argue Petitioners' fault in removing the away drain, even though they could have hidden that fact, but voluntarily provided pictures of the removal. It is human nature to keep our sins concealed. At the advice of their counsel to mitigate damages, if any, Petitioners removed the screen to avoid any argument that they were causing the water infiltration into the home. No allegation of wrongdoing was anticipated as the Coyne Respondents' expert had already inspected the screen.

Mr. Caldwell took pictures of the screen over the away drainduring his inspection on March 16, 2015. Appendix Vol. 5, pg. 5292-5300.

Mr. Caldwell took pictures of the basement cement block walls that were dry. Appendix Vol. 5, pg. 5452-5474.

Mr. Caldwell testified that in his analysis of the case, including his own pictures, that the water in the control joints and the standing water on the basement floor could come in from a high ground water table, natural spring or break in the perimeter foundation pipe. He did not mention the screen over the away drain. He testified as follows:

> Q. Sitting here today, in your memory and your analysis of the case, **including looking at your own pictures**, do you have any question in your mind that the water may have been there unnaturally?
>
> A. Again, with the qualification that once it was determined that the mason did not have anything to do with the foundation drains and I did not further review any of that, **I saw nothing that raised a red flag that said to me something is not normal here**. I did not see that.
>
> Q. Could you tell me in your experience what could be the cause of the water intrusion in the Smith home?

A. Just based on generalized experience, the water underneath the floor slab could come from a **high ground table, ground water table**. It could come from **a natural spring**. These are all logical explanations that I haven't investigated. It could come from a **break in the perimeter foundation pipe** that's not draining properly. Those are logical explanations of - - those are logical possible explanations just based upon experience and what I've seen in the past.

Q. Could it also come from poor water proofing of the foundation?

A. Experience would tell me that there's not enough water that would come through even a breach in a wall waterproofing system that would create the water I saw in the basement floor and under the floor.

Appendix Vol. 2, pgs. 2514-2515, Caldwell Deposition, page 7, line 6 to page 8, line 18. (Emphasis added).

There is no evidence that the screen over the away drain blocked it, or slowed water flow, or caused any water infiltration into the home.

After the screen was removed on March 18, 2015, Petitioners basement again had water on the basement walls(Appendix Vol. 6, pgs 6755-6761) on September 29, 2015 and water was flowing freely from the drain. (Appendix Vol. 6, pgs 6756-6757). On January 16, 2016 puddles flooded the basement floor. Appendix Vol. 6, pgs 6778-6790. Petitioners basement again had water on the basement walls(Appendix Vol. 6, pgs 6796-6810) on May 10, 2016 and water was flowing freely from the drain. Appendix Vol. 6, pgs 6811. This indicates that after the screen was on the away drain water infiltrated into the basement likely from a high ground water table, natural spring or break in the perimeter foundation pipe just like Coyne Respondents' expert, Lorey Caldwell, indicated.

E. Disassembling the bannister.

Two (2) days after Mr. Caldwell inspected the property on March 16, 2015. Kenneth Smith disassembled and assembled the bannister on March 18, 2015, Appendix Vol. 6, pgs. 6688-6695. There was no "test" other than measuring the depth of the water in the hole that Respondent Gebhardt had placed in the concrete slab floor to place a metal rod in to support the bannister.

Again, all Respondents were invited to do the same disassembly, measurements and assembly. Appendix Vol. 2, pg. 1523. None of the evidence was destroyed, altered, or discarded.

F. Performing mold tests.

All Respondents were given an opportunity to do their own mold tests and declined. Appendix Vol. 1, pg. 574. That may be because Respondent Gebhardt's mold expert, Charles Guinther, indicated the testing done by John Gongola was reliable and the Trial Court permitted evidence of the testing. Appendix Vol. 1, pg. 125. Although the Coyne Respondents noted the Trial Court found that the testing was "potentially prejudicial," it made an express finding that it "cannot conclude that Defendants spoliation claim has merit." Appendix Vol. 1, pg. 125.

The Coyne Respondents argue at page 25 of their Response Brief that this Order put Petitioners "on notice" regarding their conduct. However, the Order was not entered until March 9, 2017. Appendix Vol. 1, pg. 124. That was about two years after Petitioners' last actions of removing the screen from the away drain and disassembling the Newel post on March 18, 2015, and over a month after the February 3, 2017, Order dismissing the case.

ii. Petitioners' expert disclosures are not "untruthful and inaccurate" and inappropriate grounds for dismissal.

The Coyne Respondents argue that "Petitioner does not defend Martin Maness or Alan Baker, in its Brief." Coyne Respondents' Brief at page 26.

Petitioners' main experts were John Gongola, Martin Maness and Alan Baker. Due to the page restraints by the Rules of Appellate Procedure and the significant arguments which needed to be made regarding spoliation of evidence, tape recording and use of Respondent Gebhardt's expert, Phil Huffner, only limited pages were left to address the expert disclosures. Regarding Josh Emery and Fred Casale Petitioners' Appeal Brief argued there was an erroneous assessment of the evidence

as they were not causation experts. See Petitioners' Appeal Brief at page 33. The Coyne Respondents now argue that Josh Emery had also been named to testify regarding the effectiveness of the past June 20, 2012, proposal to effectively waterproof the Smiths' entire basement area which is true. However, that was not due to the causation of the water, but rather that the estimate was for only one corner of the house. Appendix Vol. 5, pg. 5492-5493. It was not a complete perimeter interior drain and therefore did not carry any warranty regarding the entire basement. Appendix Vol. 5, pg. 5496.

The Petitioners' Appeal Brief and Reply to Respondent Gebhardt's Response Brief identifies industrial hygienist, John Gongola, and defends his opinions as Petitioners are requesting reversal and remand for trial and hope direction from this Supreme Court permits them to fully utilize all of Mr. Gongola's opinions. See Petitioners' Appeal Brief, page 33 and Petitioners' Reply to Respondent Gebhardt's Brief, pages 16 through 19.

Petitioners' defense of the opinions of Martin Maness and Alan Baker are again subject to page limitations. A review of the Court Orders regarding these experts proves that the "excluded" opinions were improperly counted as many of the opinions were permitted "if a proper foundation was laid." Appendix Vol. 1, pgs. 93,94,96,97,100, relating to Maness and pg. 120, relating Baker.

Petitioners previously addressed their defense of Mr. Maness in Plaintiffs' Response to Defendant Gebhardt's Motions in Limine and Motion for Sanctions: Martin Maness, comprised of 20 pages, which supports the argument that the Trial Court made an erroneous assessment in excluding some of his opinions. Appendix Vol. 2, pgs. 1701-1720.

Petitioners also previously addressed their defense of Mr. Baker in Plaintiffs' Response to Defendant Gebhardt's Motion in Limine and Motion for Sanctions: Alan Baker, comprised of 23

pages, plus additional Exhibits,which supports the argument that the Trial Court made an erroneous assessment in excluding some of his opinions. Appendix Vol. 2, pgs. 1525-1582.

The Trial Court did not hold an evidentiary hearing concerning the opinions of the experts. The Petitioners have argued from the beginning that the Court made an erroneous assessment of the law in disqualifying the experts for the majority of their opinions. The Trial Court's determination that the disclosure "sent the Defendants on a costly and time consuming wild goose chase in discovery" (Appendix Vol. 1, pg. 21) is based upon that erroneous assessment of the law regarding admissibility of expert opinions. Those detailed expert disclosures for Alan Baker, Martin Maness and John Gongola came after inspecting the home with each of them, showing them hunderds of pictures, interviewing each of them and going over the Expert Disclosures with them.

"Rule 703 does not limit admissibility of expert opinions to opinions formed solely on the basis of first-hand experience. Franklin Cleckley, Handbook on Evidence for West Virginia Lawyers, § 7-3(b)3rd Ed. (1994)." Caper v. Gates, 193 W.Va. 9, 454 S.E.2d 54, 59 (1994).

> This means that the expert is permitted to learn the facts prior to trial by a variety of means such as personal examination, first hand investigation, files, reports of other specialists, other reports or comments of professional observers. The only requirement is that the sources be reliable in the sense that they are normally relied upon in the expert's field, even though these materials may not qualify for admission into evidence.

Caper, Supra.

Respondent Gebhardt's counsel zealously defended the case inferring to Alan Baker that he could only give opinions on what he experienced first-hand, otherwise he could be accused of agreeing with a fraudulent conspiracy of faking the presence of water by "planting" it by asking questions accusatory of the Petitioner and their counsel of intentionally placing water on the floor.

> Q. You've seen a photograph that shows some water collected into a control joint; yes?

A. Yes.

Q. You would agree that you have no idea how the water got in that picture.

A. It - - I don't know.

Q. **Ron could have put some water in the control joint. The Smiths could have done it. Right?**

A. Potentially.

Exhibit 1, Baker Deposition, page 87, line 23 to page 88, line 8. (Emphasis added).

iii. Petitioners' interaction with Defendants' expert witness and Respondent Gebhardt are not appropriate grounds for dismissal as a sanction against both Defendants.

A. The Trial Court's decision on these matters are based upon an erroneous assessment of the law or an erroneous assessment of the evidence.

First, Petitioners' counsel recorded a conversation with Respondent Gebhardt prior to the filing of the law suit which is a statutory right pursuant to West Virginia Code, § 62-1D-3(e).

Second, Respondent Gebhardt's expert, Phil Huffner, volunteered to Petitioners' expert, Martin Maness, that the building was a "tear down." Petitioners' counsel contacted Mr. Huffner who admitted stating the home was a "tear down", but who never agreed to be Petitioners' expert.

Using an adverse party's expert witness is permitted unless the original party has the burden of proving both that (1) a confidential relationship existed with the expert and (2) confidential or privileged information was disclosed to the expert. See Syl. Pt. 3, in part, *State of West Virginia ex rel Billups v. Clawges*, 218 W.Va. 22, 620 S.E.2d 162 (2005). Respondent Gebhardt has not proved either element.

Third, Petitioners sent a subpoena to Respondent Gebhardt a week before trial which the Coyne Respondents characterized as "defective." A simple Motion to Quash or even a telephone call to Petitioners' counsel could have settled the matter.

The Coyne Respondents cite the case of *Kocher v. Oxford Life Insurance Co.*, 216 W.Va. 56, 602 S.E.2d 499 (2004, where the Defendant tried to settle the matter with the Plaintiff without his counsel being present. In this case, there is no evidence whatsoever that the process server, John Dan Livingston, was sent to offer anything to Respondent Gebhardt or get any type of information from Respondent Gebhardt. The only evidence was that he was sent to serve the subpoena.

B. Respondent Coyne would not be prejudiced by remaining in the case.

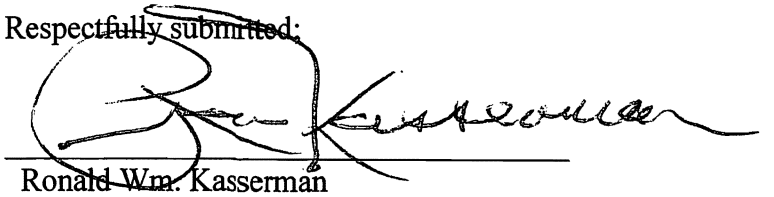
As previously indicated, the Coyne Respondents' expert, Lorey Caldwell, investigated the premises and came up with the opinion that the Coyne Respondents did nothing wrong to cause water intrusion. That is the best defense expert opinion they could hope to have in any case. There are no actual facts to support an argument of prejudice.

The Trial Court's Order granted the Respondent Gebhardt's Motion to Dismiss and dismissed the entire case. The Coyne Respondents took no position on Respondent Gebhardt's Motion to Dismiss at the evidentiary hearing, but now join in the argument that the Trial Court was correct in granting it. The Coyne Respondents have waived the right to any position on the Motion to Dismiss.

CONCLUSION

Petitioners pray that the Trial Court's Order of February 2, 2017, be reversed and this case be remanded for trial, with directions to permit the expert opinion of John Gongola on the adverse effects of mold, construction matters and estimates related to the costs of mold remediation.

Respectfully submitted;



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SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

CERTIFICATE OF SERVICE

Service of the foregoing Petitioners' Reply to Brief of Respondents Michael Coyne and Triple S&D, Inc., was had upon the parties herein, by emailing and by mailing true and correct copies thereof, on August 24, 2017, as follows:

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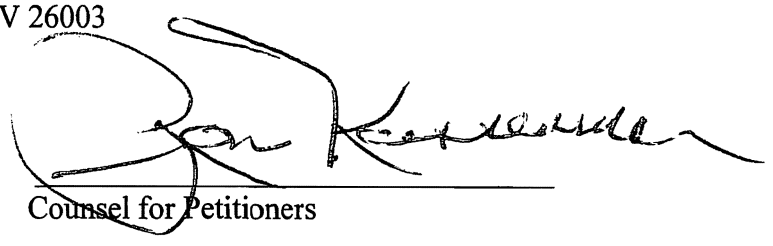

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